Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1282

PATRICK PETROLEUM CORPORATION
OF MICHIGAN
CHARLES DOUGLAS ROBINSON AND
RONALD LAMAR MEEKS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITIONERS' REPLY MEMORANDUM

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We take the unusual step of filing a reply memorandum because the government's opposition presents a novel rationale, unsupported by this Court's prior decisions, for denying certiorari.

The Solicitor General asserts that the Court, as a matter of policy, should not grant the writ where, as here, the court of appeals has reversed the district court's dismissal of an indictment for failure to state an offense against the United States.

This case comes to the Court in the same procedural posture as *Adamo Wrecking Co. v. United States,* 434 U.S. 275 (1978), in which this Court reversed the court of

appeals, and upheld the district court's determination that an indictment under the Clean Air Act, 42 U.S.C. §1857 *et seq.*, failed to state an offense. Here, as in *Adamo*, the validity or invalidity of the indictment rests upon a "difficult question of statutory interpretation," 434 U.S. at 278.[1]

In the broader sense, the Solicitor's position impliedly suggests both a fundamental shift in the certiorari policy and a studied disregard for the letter and spirit of the Criminal Appeals Act, 18 U.S.C. §3731.

The issue posed by the Solicitor's argument could not have arisen before the amendment of the Criminal Appeals Act in 1970. Title III, P.L. 91-644, 84 Stat. 1890. Prior to 1970, the Act provided for direct government appeal to this Court from a dismissal of an indictment where, as here, an issue of statutory construction was involved. *See generally United States v. Wilson,* 420 U.S. 332, 336-39 (1975); *United States v. Sisson,* 399 U.S. 267, 291-96 (1970). The 1970 amendment, by further narrowing the "obligatory jurisdiction" of the Court,[2] furthers the purposes of the 1925 Act bestowing the certiorari jurisdiction.[3]

The 1970 amendment of §3731 assimilates cases involving pretrial construction of a federal statute in ruling on a motion to dismiss to all other cases brought here on certiorari: this Court, guided by the largely unwritten considerations determining grant or denial of the writ, selects those cases presenting issues worthy of its attention.

Conference Report No. 91-1768, 91st Cong., 2d Sess.,

[1]There is no question that the Court has jurisdiction under 28 U.S.C. §1254(1), and the government raises none.

[2]The phrase is that of Mr. Justice Harlan, quoted in *Bator. et al.,* Hart & Wechsler's The Federal Courts And The Federal System 1605 (2nd ed. 1973).

[3]*See id.* at 1600-29.

1970 U.S. Code Cong. & Adm. News 5849, states unequivocally:

> Although the conference substitute does not provide for direct appeal to the Supreme Court it is recognized that under section 1254 of title 28, United States Code, cases in the courts of appeal may be reviewed by the Supreme Court directly.

Neither in statute, nor legislative history, nor in the formal and informal jurisprudence of the writ can one find support for the suggestion that, on certiorari, defendants' petitions and the government's petitions should be viewed differently when they present, pretrial, a substantial issue of statutory construction.[4]

Moreover, validity of an indictment, though it may be raised on review of a conviction,[5] is a fundamental issue going to the very power of the district court to proceed. F.R.Crim.P. 12(b)(2), echoing a venerable common law tradition[6] provides that insufficiency of the indictment is not waivable and "shall be noticed at any time."

Here, as in *Adamo Wrecking, supra,* the questions cleanly and precisely tendered by the allegations of the indictment are, we respectfully suggest, squarely within the letter and rationale of Sup.Ct.R. 19.[7]

[4]*Compare Will v. United States,* 389 U.S. 90, 97-98 (1967).

[5]*See Parr v. United States,* 363 U.S. 370, 391 (1960) ("indictment did not charge. . . .")

[6]Compare the jurisdictional language in Federal Rule of Civil Procedure 12 (h)(3).

[7]District judges, faced with an increasing number of multi-defendant "big case" white collar prosecutions, would benefit from careful direction on pretrial resolution of statutory construction issues tendered by motions to dismiss the indictment. *See* Petition For Certiorari, p. 4, n.2 and accompanying text.

CONCLUSION

We respectfully pray that the writ of certiorari issue.

Respectfully submitted,

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